(26,637)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 551.

CHARLES I. HENRY, AS SOLE EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ARTHUR T. HENDRICKS, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1918.

1 1. *Petition and Claimant's Exhibits A. B. and C.*

Filed November 20, 1916.

In the Court of Claims of the United States.

No. 33686.

CHARLES I. HENRY, as Sole Executor under the Last Will and Testament of Arthur T. Hendricks, Deceased,

vs.

THE UNITED STATES.

Petition.

Filed Nov. 20, 1916.

To The Honorable the Chief Justice and the Judges of The Court of Claims:

Your petitioner, Charles I. Henry, a citizen of the United States, City of New York, County of New York, State of New York, as sole executor under the last Will and Testament of Arthur T. Hendricks, deceased, respectfully represents:

I.

On the 13th day of June, the President of the United States approved "An act to provide ways and means to meet war expenditures and for other purposes" (30 Stats. L., 448). Pursuant to the provisions of Section 29 of said act and to the amendments thereto by an act approved March 2, 1901 (31 Stats. L., 938, 946), taxes were assessed and collected upon legacies and distributive shares of personal property passing from estates of persons who died subsequent to the approval of said acts.

2 II.

By an act approved April 12th, 1902 (32 Stats. L., 96, 97), Section 29, of the act above referred, together with all amendments thereof, was repealed, to take effect July 1, 1902.

III.

One June 27, 1902, the President approved an act entitled "An Act to provide for refunding taxes paid upon legacies and bequests

for uses of a religious, charitable or educational character, for the encouragement of art and so forth, under the act of June 13, 1898, and for other purposes (32 Stats. L., 406). The portion of said act material to this case is as follows:

"That in all cases where an executor, administrator or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments hereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

3 That on July 27, 1912, the President of the United States approved another act to provide for the refund of taxes paid upon legacies and distributive shares (37 Stats., 240), which is as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war revenue tax, or any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

IV.

On the 5th day of March, 1902, Arthur T. Hendricks, a citizen of the United States, and a resident of the City of New York, County of New York, State of New York, departed this life. Said Arthur T. Hendricks died testate, leaving a last Will and Testament, which, was thereafter, on the 17th day of March, 1902, admitted to probate

and record in the Surrogate's Court, in the City of New York, State of New York, a court having complete and exclusive jurisdiction over the estate of said Arthur T. Hendricks, by the terms of which your petitioner was constituted and appointed the sole executor and qualified as such thereunder, as shown by certified copy of
4 Letters Testamentary herewith filed, marked "Claimant's Exhibit A," and prayed to be read and considered a part of this petition. Your petitioner is still executor under the said last Will and Testament, aforesaid, such authority having never been revoked or modified.

Upon the issuance of letters testamentary to your petitioner, as aforesaid, title to all of the personal property of every kind and description forming a part of said estate, vested under the laws and statutes of the State, solely in your petitioner as executor as aforesaid, as of the date of death of Arthur T. Hendricks. In accordance with law your petitioner became upon qualifying as executor as aforesaid, immediately entitled to the possession of said personal property and accordingly had actual and exclusive possession thereof.

V.

Under and by virtue of the laws of the State of New York in force at the time of the death of the said Arthur T. Hendricks, the legatees under the last Will and Testaments, aforesaid, namely, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan, Irene A. Henriques (all sisters of the said decedent), and Florence Lester (no blood relation of said decedent) would each ultimately become entitled to receive their respective legacies, bequeathed by the last Will and Testament of the aforesaid Arthur T. Hendricks of the net personal estate of said Arthur T. Hendricks, after the payments of all debts and expenses for which the estate of Arthur T. Hendricks might be legally liable.

VI.

The said Arthur T. Hendricks died seized and possessed of personal property of the gross value of $229,476.94, subject to
5 deductions of legal debts and charges for which he or his estate was liable. Such debts and charges were subsequently ascertained in the amount of $11,506.69. All the said debts and charges were paid by your petitioner, as executor, as aforesaid, at various dates subsequent to the granting of Letters Testamentary to your petitioner and during the period allowed by the laws of the State for the presentation and payment of such claims and charges. Prior to the payment of said claims and charges the amount, if any, which said Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan, Irene A. Henriques and Florence Lester would be ultimately entitled to receive from the estate of said Arthur T. Hendricks could not under the above mentioned laws be ascertained.

The value of the net personal estate remaining in your petitioner's

possession, as executor, as aforesaid, after payments of debts and expenses amounted to $217,970.25, and such net personal estate, less the sum of $4,255.45 paid the United States, as hereinafter set forth, was paid by your petitioner as executor, as aforesaid, to the legatees, according to the terms of the last Will and Testament of the aforesaid Arthur T. Hendricks, as follows:

Eleanor Hendricks	$35,404.45
Justina L. Henry	35,404.45
Rosalie H. Allen	35,404.45
Miriam H. Nathan	35,404.45
Irene A. Henriques	35,404.45
Charles I. Henry, Trustee for Florence Lester, she having life income from $50,000 said legacy being valued at	30,185.90

Neither Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan, Irene A. Henriques nor Florence Lester received in absolute possession or enjoyment any of the personal property belonging to the estate of Arthur T. Hendricks prior to
6 July 1, 1902, within the meaning of Sec. 3 of the Act of June 27, 1902, and they were not entitled to so receive any such property prior thereto, nor were they or either of them put into absolute possession or enjoyment, nor were they or either of them entitled to absolute possession or enjoyment of any part of the personal property belonging to his estate until after the expiration of time allowed by law for the payment of debts and charges; but said personal estate remained under the control of your petitioner, as aforesaid, within the meaning of Sec. 3 of the Act of June 27, 1902, until subsequent to July 1, 1902, as he was the only person under the laws of the State of New York, as executor, entitled to absolute possession and enjoyment of the aforesaid personal estate on or before July 1, 1902. An account was filed by him, as such executor, in the Surrogate's Court in the City of New York, County of New York, State of New York, on the 14th day of April, 1903, which was confirmed by decree on same date by said Court when these legatees, namely, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan, Irene A. Henriques, and Florence Lester for the first time became entitled to absolute possession and enjoyment under said laws of the personal estate of the aforesaid Arthur T. Hendricks, deceased, as shown by certificate of Clerk of said Court marked "Exhibit B" and prayed to be read and considered a part of this petition.

VII.

On or about the 6th day of December, 1902, the Collector of Internal Revenue in the City of New York (3rd Internal Revenue District), as aforesaid, acting for and on behalf of the United States and assuming to act as such under the provisions of the Act of Congress, approved June 13, 1898, and amendments heretofore referred

to, collected from your petitioner, as executor, as aforesaid, the sum of $4,255.45, claiming the same to be legally assessed under
7 said act on account of the alleged interests of said legatees, namely, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan, Irene A. Henriques and Florence Lester in said personal estate in the following amounts, viz:—

Legatee.	Relationship.	Legacy.	Rate for every $100.	Tax.
Eleanor Hendricks,	Sister	$35,404.45	1.12½	$398.30
Justina L. Henry,	Sister	35,404.45	1.12½	398.30
Rosalie H. Allen,	Sister	35,404.45	1.12½	398.30
Miriam H. Nathan,	Sister	35,404.45	1.12½	398.30
Irene A. Henriques,	Sister	35,404.45	1.12½	398.30
Charles I. Henry Trustee for Florence Lester, she having life income from $50,000, said legacy being valued at	No Relation.	30,185.90	7.50	2,263.95
				$4,255.45

Said sum of $4,255.45 was paid by your petitioner without protest and was duly turned over and delivered to the United States by said Collector of Internal Revenue in the usual and ordinary course of his duties as such Collector.

VIII.

On the 5th day of October, 1904, your petitioner duly filed an application in the Treasury Department for the refundment of all of said moneys. Said claim was in all respects complete, regular and in accordance with the law and regulations and was accompanied by all the necessary evidence and proof of facts, as alleged in said application, and was not traversed or denied by the Secretary
8 of the Treasury, nor by any representative of the United States. Although said application was in all respects complete and in due form, nevertheless on the first day of March, 1912, there was only allowed to your petitioner out of the entire amount of tax paid the sum of $214.36 by settlement of the Auditor for the Treasury Department, number 16,995, representing the tax paid on the contingent, beneficial interests divested to the aforesaid five sisters of Arthur T. Hendricks, deceased. The claim for the difference (or the amount in excess of $214.36, viz: *$4,041.09* was disallowed, rejected and denied by the Secretary of the Treasury.

IX.

Further, on or about the 4th day of March, 1915, and the 5th day of April, 1916, your petitioner, by his attorneys, duly filed applications in the Treasury Department for the refund of the balance of

said moneys, viz: $4,041.09. Said applications were in all respects complete, regular and in accordance with the law and regulations and were accompanied by all the necessary evidence and proof of facts. The facts as alleged in said applications were not traversed or denied by the Secretary of the Treasury, or by any representative of the United States. Although said applications were in all respects complete, and in due form, nevertheless, on the 8th day of November, 1915, the Secretary of the Treasury allowed your petitioner on the claim filed March 4, 1915, the sum of $249.61, by settlement of the Auditor for the Treasury Department No. 33,331, representing an additional amount erroneously collected on the interest of the legatees of the aforesaid decedent, Arthur T. Hendricks, and rejected and denied said application for the balance of the tax, viz: $3,791.48, and also the application filed April 5, 1916, and he has continuously declined, and still declines and refuses to pay to your petition the moneys asked and demanded in his application as aforesaid, as shown by the letter of the Commissioner of Internal Revenue herewith filed and marked "Claimant's Exhibit C" and prayed to be read and considered a part of this petition.

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X.

Your petitioner is advised by counsel, and therefore avers that Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Mariam H. Nathan, Irene A. Henriques, and Florence Lester (each of whom were alive subsequent to July 1, 1902), did not receive or come into absolute possession or enjoyment of and were not entitled to receive in absolute possession or enjoyment any part of the personal estate of Arthur T. Hendricks, deceased, prior to July 1, 1902, within the meaning of Sec. 3 of the Act of June 27, 1902, aforesaid; that the moneys which were collected from your petitioner as taxes thereon are refundable to him as sole executor under the last Will and Testament, aforesaid, under the terms of, and directions contained in, the third section of the Act of Congress approved June 27, 1902, and under the terms and directions of the Act of Congress approved July 27, 1912, as hereinbefore set forth, and that the refusal of the Secretary of the Treasury to so refund such moneys is directly in violation of said act.

XI.

No action upon this claim, other than hereinbefore set forth has been taken before the Congress or any of the Departments of the Government.

XII.

Petitioner avers that there is justly due and owing to him as executor under the last Will and Testament of Arthur T. Hendricks, from the United States on account of matters hereinbefore set forth, the sum of $3,791.48, after deducting all just set offs and demands on the part of the United States, that he as such executor is the sole owner of the claim herein sued upon, and that

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no assignment or transfer of the claim or any part thereof, or any interest in same, has been made.

Wherefore your petitioner prays judgment against the United States for $3,791.48.

CHARLES I. HENRY,
As Sole Executor of the Estate of Arthur T. Hendricks, Deceased.,
By LYON & LYON,
Attorneys of Record.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Personally appeared before me, a Notary Public in and for the aforesaid City and District, R. B. H. Lyon, who being duly sworn according to law, deposes and says that he is a member of the firm of Lyon & Lyon, that he has been duly authorized to make oath in this cause, by power of attorney herewith filed, that he has read and understands the foregoing petition, and that the matters and facts therein set forth are true in substance and in fact as he is informed and believes.

R. B. H. LYON.

Subscribed and sworn to before me this 17th day of November, A. D. 1916.
[SEAL.]

GEORGE W. SMITH,
Notary Public.

(My commission expires March 11, 1920.)

11 CLAIMANT'S EXHIBIT "A."

The People of the State of New York, by the Grace of God Free and Independent, to all to whom these presents shall come or whom they may concern, send Greeting:

Know Ye, That at the County of New York, on the 17th day of March, in the year of our Lord one thousand nine hundred and two, before Honorable Abner C. Thomas, a Surrogate of our said county, the Last Will and Testament of Arthur T. Hendricks, deceased, was proved, and is now approved and allowed by us; and the said deceased having been at the time of his death a resident of the County of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us, the administration of all and singular — goods, chattels and credits of the said deceased in any way concerning his will, is granted unto Charles I. Henry of the City of New York, N. Y., the executor in the said will named, he being first duly sworn, well, faithfully and honestly to discharge the duties of such executor. In Testimony Whereof,

we have caused the seal of office of the Surrogates' Court of the County of New York to be hereunto affixed.

[SEAL.]

Witness, Honorable Abner C. Thomas, a Surrogate of our said County of New York at said county, the 17th day of March, in the year of our Lord one thousand nine hundred and two.

[SEAL.] J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogate Court.

12 STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of Letters Testamentary granted to Charles I. Henry upon the Estate of Arthur T. Hendricks, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Surrogate's Court of the County of New York, this 22nd day of December in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

Revenue stamp attached.

No. 153331.

The People of the State of New York to all to whom these presents shall come or may concern, send Greeting:

Know ye, That we, having inspected the Records of our Surrogates' Court in and for the County of New York, do find that on the 17 day of March in the year one thousand nine hundred and two, by said Court, Letters Testamentary on the estate of Arthur T. Hendricks, late of the County of New York, deceased, were granted unto Charles I. Henry of the City of New York, N. Y., the Executor named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

In Testimony Whereof, we have caused the seal of the Surrogates' Court of the County of New York to be hereunto affixed.

13 Witness, Honorable Robert Ludlow Fowler, a Surrogate of our said County, in The City of New York, the 22 day of Nov. in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JOHN H. NAGLE,
Deputy Clerk of the Surrogates' Court.

CLAIMANT'S EXHIBIT "B".

At a Surrogate's Court, held in and for the County of New York, at the Surrogate's office, in the County of New York, on the 14th day of April, in the year one thousand nine hundred and three.

Present: Hon. Abner C. Thomas, Surrogate.

In the Matter of the Judicial Settlement of the Account of CHARLES I. HENRY, as Executor of the Last Will and Testament of Arthur T. Hendricks, Deceased.

Charles I. Henry, Executor of the last Will and Testament of Arthur T. Hendricks, late of the City and County of New York, deceased, having heretofore made application to the Surrogate of the County of New York, for a judicial settlement of the account of such Executor, and all persons interested in said estate as legatees or as next of kin or otherwise having waived the issue and service of citation herein and consented that a decree be made settling the account of said Charles I. Henry as Executor, and the said Executor having rendered his account under oath, before the said Surrogate; and the said account having been filed, together with the vouchers in support thereof, said Surrogate after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, made by the said Surrogate as judicially settled and adjusted by him to be recorded with and taken to be a part of the decree in this matter, towit:

14 A Summary Statement of the Account of Charles I. Henry, as Executor of the Last Will and Testament of Arthur T. Hendricks, Deceased, made by the Surrogate as Judicially Settled and Allowed.

The said Executor is charged as follows:

To amount of inventory,.....		$229,476.94
To amount of increase as shown by Schedule A,.....		2,651.22
To amount of increase as shown by Schedule F.....		1,196.25
		$233,324.41

The said Executor is credited as follows:

With amount of loss on sales, &c., as per Schedule B.....	$25.00	
With amount of debts not collected as per do.....	00.00	
With amount of Schedule C.....	10,137.91	
With amount of Schedule D.....	678.42	
With amount of Schedule E.....	167,680.00	
With amount of Schedule F.....	50,000.00	
		228,521.33
leaving a cash balance in his hands of.....		$4,803.08

And it appearing that the said Executor has fully accounted for all the moneys and property of the estate of said deceased, which have come into his hands as such Executor and his account having been adjusted by the said Surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, Adjudged and Decreed, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted.

And it is Further Ordered, Adjudged and Decreed, that out of the balance so found, as above, remaining in the hands of the
15 said Executor, he retain the sum of two thousand five hundred and twenty-two dollars and ninety-nine cents ($2,522.99) for the commissions to which he is entitled on this accounting; and that he retain the sum of one hundred and forty-three dollars and five cents ($143.05) for costs, counsel fee and disbursements on this accounting, and that he divide, pay over and distribute the balance of the funds remaining in his hands, to wit, the sum of $2,137.04, among the residuary legatees, as follows, to Eleanor Hendricks $427.40, to Justina L. Henry $427.41, to Rosalie H. Allen $427.41, to Miriam H. Nathan 427.41, and to Irene A. Henriques 427.41, equally.

And it is further Ordered that upon so doing he be and is hereby discharged as Executor of the last Will and Testament of Arthur T. Hendricks, deceased, and freed of and from all responsibility to any person interested in said will on account of his acts and doings thereunder as to all matters embraced in this accounting.

ABNER C. THOMAS,
Surrogate.

STATE OF NEW YORK,
County of New York, ss:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of Decree in the Matter of the Judicial Settlement of the Estate of Arthur T. Hendricks, deceased. (filed April 14th, 1903), with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Surrogates' Court of the County of New York, this 22nd day of December in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

Revenue stamp attached.

16 STATE OF NEW YORK,
County of New York, ss:

I find the record of an accounting in the estate of Arthur T. Hendricks, filed April 14, 1903, and a decree thereon of the same date, and no other.

[SEAL.]

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

CLAIMANT'S EXHIBIT "C."

GB Treasury Department ECJ

O.R.V. Washington GEF

Office of
Commissioner of Internal Revenue

In replying refer to
Cl. R—Rejection of claim—

November 13, 1916.

Messrs. Lyon & Lyon, Evans Building, Washington, D. C.

SIR: Your claim as attorney for the estate of Arthur T. Hendricks, deceased, for the refund of $3,791.48, tax on legacies, is hereby rejected, since the evidence filed with the claim shows that the legacies passing under the will had vested in the possession and enjoyment of the legatees prior to July 1, 1902. The tax having been assessed at the proper rate, was therefore legally due.

Respectfully,

W. H. OSBORN,
Commissioner.

hf

17 II. *General Traverse.*

Court of Claims.

No. 33686.

CHARLES I. HENRY, as Sole Executor under the Last Will and Testament of Arthur T. Hendricks, Deceased,

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On June 3, 1918, the case was argued and submitted on merits by Mr. R. B. H. Lyon, for the claimant, and Mr. Charles H. Bradley, for the defendants.

18 IV. *Findings of Facts and Conclusion of Law.*

Entered June 17, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following:

Findings of Fact.

I.

The plaintiff is the duly qualified and acting sole executor of the last will and testament of Arthur T. Hendricks, deceased, late a citizen of the United States and a resident of the city and county of New York, in the State of New York.

II.

On March 5, 1902, the said Arthur T. Hendricks died, leaving a last will and testament, which was admitted to probate and record on March 17, 1902, in the Surrogate's Court for said county of New York, and letters testamentary were thereupon issued to the plaintiff as executor of said will.

III.

By paragraphs numbered second, third, fourth and fifth of the last will and testament of the said Arthur T. Hendricks, deceased, his estate was disposed of as follows:

"Second: I give and bequeath to my nephew, Charles I. Henry of said City, the sum of fifty thousand dollars free from succession or collateral inheritance tax, to have and to hold the same to him and his successors in trust for the following purposes, viz: to invest the same in good and valid securities and to collect the income arising therefrom and pay it over as soon as collected to Florence Lester, now residing at No. 1365 Broadway in said City, said Trust to continue for and during the term of her natural life.

19 Third: At the death of the said Florence Lester, I direct that said sum of fifty thousand dollars or the securities in which it shall then be invested, shall be and become part of my residuary estate.

Fourth: I give and bequeath to the said Charles I. Henry, who has promised to act as Trustee, as aforesaid, the sum of ten thousand dollars, free from succession or collateral inheritance tax, the same to be received by him in lieu of commissions as such trustees.

Fifth: All the rest, residue and remainder of my estate both real

and personal and wheresoever situate (including the aforesaid sum of fifty thousand dollars or the securities in which the same may be invested from and after the death of the said Florence Lester) I give, devise and bequeath to my five sisters, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene A. Henriques, to be divided among them, share and share alike. In case any one of my said sisters should die before me leaving issue her and me surviving, I give and bequeath the share of my residuary estate to which she would be entitled, if living, as hereinbefore provided, to such issue. If however, such one of my sisters so dying should not leave issue her and me surviving, then and in that case, I direct that such share shall be divided among the survivors of my said sisters, share and share alike."

Said will contained no provision requiring the payment of any legacy thereunder prior to the expiration of the legal period for the administration of the estate.

All of the legatees under said will survived the testator and were still surviving on July 1, 1902. The said Florence Lester was unrelated to the testator and at the time of the testator's death was forty years of age.

IV.

Beginning on or about March 20, 1902, the executor duly published the six-month notice provided for by Section 2718 of the Code of Civil Procedure of the State of New York, requiring persons having claims against the estate to present the same within the time specified by said notice, which time expired on or about September 20, 1902.

V.

The said Arthur T. Hendricks died possessed of personal property of the value of $229,476.94. The valid and allowed claims against the estate amounted to $11,505.69, leaving $217,970.25 as his net personal estate. The time allowed by law for the presentation of claims against the estate had not expired on July 1, 1902, and such claims could not be fully ascertained or determined at that time, but were ascertained and paid by the executor in due course of administration, some of them prior to July 1, 1902, and some subsequent thereto.

VI.

On or about December 2, 1902, the United States Collector of Internal Revenue for the Third District of New York, acting for and in behalf of the United States, under the provisions of the Act of Congress approved June 13, 1898, entitled "An Act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448), and amendments thereto, assessed a tax of $4,255.45 upon legacies passing under said will, as follows:

(1) Upon the legacy of each of the testator's said sisters, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene A. Henriques, a tax of $398.30, said tax being computed at

the rate of $1,125 per hundred dollars on an assessed value of $35,-404.45 for each of said legacies, a portion of which valuation was the assessed value of the legatee's reversionary interest in the trust fund provided for by the second paragraph of the will, after the termination of the life estate of the said Florence Lester therein.

(2) Upon the legacy of the said Florence Lester a tax of $2,-263.95, said tax being at the rate of $7.50 per hundred dollars upon an assessed valuation of $30,185.90 for said legacy, which value was computed in accordance with the rules laid down in Treasury Decision No. 20,443 of December 16, 1898.

The total of the tax assessed as aforesaid was, on December 6, 1902, collected by said Collector of Internal Revenue from the plaintiff, as executor, without protest on his part, and was by said collector duly turned over and covered into the Treasury of the United States.

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VII.

Of the total and combined amounts received by the said five sisters of the testator as beneficiaries under the will, and upon which taxes were paid by the executor as set forth in finding VI above, the sum of $135,780 was received by them from the executor, in equal shares, prior to July 1, 1902, upon which amount $1,527.53 of the said tax was assessed and collected.

Prior to July 1, 1902, the executor set up or established the trust fund provided for by the second paragraph of the will for the benefit of the said Florence Lester, but no part of the income from said trust fund was received by the said Florence Lester prior to July 1, 1902.

VIII

On or about October 5, 1904, the plaintiff filed an application in the Treasury Department for refund of said tax of $4,255.45 under the provisions of Section 3 of the Act of June 27, 1902 (32 Stat. 406); and on or about March 7, 1912, said application was allowed and paid by the Treasury Department in the sum of $214.36, the remainder of the claim being disallowed on the ground that the taxes embraced by it had been legally collected. Said allowance of $214.36 was the amount of the tax assessed and collected upon the reversionary interests of the said Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene A. Henriques in the trust estate provided by the second paragraph of the will.

IX.

The plaintiff by his attorneys, on or about March 4, 1915, filed an application asking refund under Section 3 of said Act of June 27, 1902, of the remaining $4,041.09 of said tax on the ground that no part of the legacies upon which it was collected had vested in absolute possession or enjoyment prior to July 1, 1902. Upon said application the Treasury Department, on or about November 10, 1915,

22 made an additional allowance and payment to the plaintiff of $249.61, said sum being the amount of the tax collected

upon portions of the direct legacies of the said five sisters of the testator which had not been received by them prior to July 1, 1902.

The remaining and unrefunded $3,791.48 of said tax consists of the $1,527.53 collected upon the $135,780 received by the five sisters of the testator prior to July 1, 1902, as set forth in finding VII above, and the $2,263.95 collected upon the life income legacy of Florence Lester as shown by finding VI, the trust fund for the production of which was established prior to July 1, 1902.

X.

On or about April 5, 1916, the plaintiff, by his attorneys, filed an application in the Treasury Department for a refund of the remaining $3,791.48 of said tax on the alleged grounds that it had been "collected and retained on contingent beneficial interests which did not vest in absolute possession or enjoyment prior to July 1, 1902," and that its refund was directed by the said Act of June 27, 1902, and by the Act of July 27, 1912 (37 Stat. 240). Said application was rejected by the Treasury Department on November 13, 1916, on the ground that said sum was legally due and collected by the United States.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claim for the tax sought to be recovered in this case is barred by the Statutes of Limitation and that the plaintiff's petition should be and it is hereby dismissed, with judgment against the plaintiff in the sum of fifty-one dollars and thirty cents ($51.30) for the cost of printing the record, to be collected by the clerk as provided by law.

23 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventeenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that Charles I. Henry, as sole executor, under the last will and testament of Arthur T. Hendricks, deceased, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and, that the petition be and it hereby is dismissed; And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from Charles I. Henry, as sole executor under the last will and testament of Arthur T. Hendricks, deceased, the sum of Fifty-one dollars and thirty cents ($51.30), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. *Claimant's Application for, and Allowance of, an Appeal.*

From the judgment rendered in the above-entitled cause on the 17th day of June, A. D. 1918, in favor of the defendant, the claimant, by his attorneys, on the 24th day of June, 1918, makes application for, and gives notice of, and appeal to the Supreme Court of the United States, the amount involved being the sum of Three Thousand Seven Hundred and Ninety-one Dollars and forty-eight cents ($3,791.48).

LYON & LYON,
Attorneys for Claimant.

Filed July 1, 1918.

Ordered: That the above appeal be allowed as prayed for.
July 3, 1918.

EDWARD K. CAMPBELL,
Chief Justice.

24 Court of Claims of the United States.

No. 33686.

CHARLES I. HENRY, as Sole Executor under the Last Will and Testament of Arthur T. Hendricks, Deceased,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this Third day of July, A. D., 1918.

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

[Seal Court of Claims.]

Endorsed on cover: File No. 26637. Court of Claims. Term No. 551. Charles I. Henry, as sole Executor under the last will and testament of Arthur T. Hendricks, deceased, appellant, vs. The United States. Filed July 8th, 1918. File No. 26,637.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. 162.

CHARLES I. HENRY, AS SOLE EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF ARTHUR T. HENDRICKS, *Appellant.*

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT.

This is an appeal from the United States Court of Claims dismissing the cause on the ground that it was barred by the Statute of Limitations (Record 15).

It involves the refund of a tax imposed on certain legacies under the War Revenue Act of June 13, 1898 (30 Stat. L. 448) in the matter of the Estate of Arthur T. Hendricks, deceased.

Said Arthur T. Hendricks, late a citizen of the United States domiciled and died in the City of New York, State of New York on the 5th day of March, 1902 (Finding II, Record 12) testate and his last Will and Testament was admitted to probate and record on March 17, 1902, in the Surrogates' Court of the County and State of New York and letters testamentary were thereupon issued to the appellant as the sole executor, (Findings I & II, Rec. pp. 7, 12). By paragraphs second and third of his Last Will and Testament, Charles I. Henry, the appellant, was made trustee of a legacy of Fifty thousand dollars ($50,000) for the life use of Florence Lester, a stranger in blood, she to receive the entire income therefrom for the term of her natural life and on her death, the corpus or principal of this trust estate, to fall in and become a part of the residuary estate. (Finding III, Rec. 12, 13).

By paragraph five of said Last Will and Testament, the residuary estate was bequeathed in equal shares to the five sisters of the deceased testator absolutely, namely: Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene Henriques, *said Will containing no provision requiring the payment of any legacy thereunder prior to the expiration of the legal period for the administration of the estate* as provided by the laws of the State of New York. (Finding III Rec. 13.) All of the above mentioned legatees survived the testator and were alive on July 1, 1902. The

said Florence Lester (cestui que trust), was at the time of his death, forty (40) years of age (Finding III Rec. 13). Beginning on March 20, 1902, the executor duly published the six-month notice as required by Sec. 2718 of the Code of Civil Procedure of the State of New York, requiring all persons having claims against the estate to present the same within the time specified by said notice, which time expired on or about September 20, 1902. (Finding IV, Rec., 13.) Arthur T. Hendricks, the testator, left personal property of the gross value of Two Hundred Twenty-nine Thousand, Four Hundred Seventy-six Dollars and Ninety-four cents, ($229,476.94).

There were debts due from the estate, which were subsequently ascertained to aggregate the sum of Eleven Thousand, Five Hundred and Five Dollars and Sixty-nine Cents, ($11,505.69), which appellant, as sole executor paid on various dates subsequent to his appointment and extending beyond July 1, 1902. (Finding V, Rec. 13).

Under the laws in force in the State of New York, the legatees, under the Last Will and Testament of Mr. Hendricks, were not entitled as such, to receive in absolute possession or enjoyment any part of the personal estate until several months after July 1, 1902.

The value of the net personal estate remaining in appellant's hands as sole executor, after the payment of debts and expenses, was Two Hundred and Seventeen Thousand, Nine Hundred and Seventy Dollars and Twenty-five Cents ($217,070.25), and this sum less the sum of Four Thousand Two Hundred and Fifty-Five Dollars and Forty-five cents ($4,255.45), paid the

United States for legacy taxes, as hereinbefore set forth was by appellant, divided in accordance with the terms and directions of the Last Will of this deceased testator, such division being pursuant to the decree of judicial settlement by the Surrogates' Court on April 14th, 1903, (Rec. 9, 10).

On December 2nd, 1902, the United States Collector of Internal Revenue for the Third District of New York, assessed a tax of Four Thousand Two Hundred and Fifty-five Dollars and Forty-five Cents, ($4,255.45) under the Spanish War Revenue Act of June 13, 1898, (30 Stat. L., 448) and amendments thereto, as follows:

(1). Upon the legacy of each of testator's sisters, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene A. Henriques, a tax of Three Hundred and Ninety-eight Dollars and Thirty Cents ($398.30), said tax aggregating $1,991.50, said tax being computed at the rate of $1.125 per $100. for each $100, on an assessed value of Thirty-five Thousand Four Hundred and Four Dollars and Forty-five Cents, ($35,404.45) for each of said legacies, a portion of which valuation included the reversionary interest of the above mentioned legatees in the trust fund provided by the second paragraph of the Will, which trust created a life interest for Florence Lester, who was alive on July 1, 1902.

(2). Upon the legacy of the said Florence Lester, consisting of a life interest in the above trust fund, a tax of Two Thousand Two Hundred and Sixty-three Dollars and Ninety-five Cents ($2,263.95). was paid, said tax being at the rate of Seven Dollars and Fifty

Cents ($7.50) per hundred dollars upon an assessed valuation of Thirty Thousand, One Hundred and Eighty-five Dollars and Ninety Cents ($30,185.90) for said life interest, which was computed in accordance with the Mortuary Tables and rules laid down in Treasury Decision No. 20,443 of December 3, 1898. (Finding VI, Rec. 13, 14).

The total tax assessed as aforesaid was, on December 6th, 1902, collected by said Collector of Internal Revenue, from appellant without protest and duly turned over and covered into the Treasury of the United States. (Finding VI, Rec. 13, 14).

Of the total and combined amounts of personal estate bequeathed in legacies by said Will, the said five sisters of the testator were advanced, the sum of One Hundred Thirty-five Thousand Seven Hundred and Eighty Dollars ($135,780.00), equally divided among them, upon which amount One Thousand Five Hundred and Twenty-seven Dollars and Fifty-three Cents ($1,527.53) of the total tax collected and this latter amount is now retained in the Treasury of the United States. (Finding VII, Rec. 14.)

Prior to July 1, 1902, the appellant, the sole executor, set up or established in his own hands, the trust fund of Fifty Thousand Dollars ($50,000), provided for by the second paragraph of the Last Will and Testament aforesaid, for the benefit of the said cestui que trust, Florence Lester, *but no part of the income from said trust fund was paid over or received by her prior to July 1, 1902*, upon which trust the amount of Twenty-Two Hundred and Sixty-Three Dollars and Niney-five Cents, ($2,263.95) was assessed and col-

lected and of the total tax, this amount, $2,263.95, is now also retained in the Treasury of the United States (Finding VII. Rec. 14).

On October 5, 1904, under Section 3 of the Act of June 27, 1902 (32 Stat., 406), appellant filed an application to have all ($4,255.45) such moneys refunded to him, which application the Secretary of the Treasury held nearly eight (8) years without action thereon. On March 7, 1912, said application was allowed in part by the Treasury Department in the sum of Two Hundred and Fourteen Dollars and Thirty-Eight Cents, ($214.38) to appellant, the balance of said claim being disallowed. Said allowance of Two Hundred and Fourteen Dollars and Thirty-Eight Cents ($214.38) represented the tax collected on the reversionary interest of the said sisters, Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene A. Henriques, in the trust estate provided by the second paragraph of the said Last Will and Testament created for the benefit of Florence Lester, (Finding VIII, Rec. 14).

On March 4, 1915, appellant, by his attorneys, filed a supplemental application for refund under Section 3 of the Act of June 27, 1902, for the remaining Four Thousand and Forty-One Dollars and Nine Cents ($4,041.09) of said tax. Upon said application, the Treasury Department on November 10, 1915, made an additional allowance and payment to appellant of Two Hundred and Forty-Nine Dollars and Sixty-One Cents ($249.61), said sum representing the amount of tax collected on portions of the direct legacies of the said five sisters of the testator, and again rejected the

claim for the balance of said tax or Three Thousand Seven Hundred and Ninety-One Dollars and Forty-Eight Cents, ($3,791.48).

The remaining and unrefunded sum of Three Thousand Seven Hundred and Ninety-One Dollars and Forty-Eight Cents, ($3,791.48) of said tax consists of the One Thousand Five Hundred and Twenty-Seven Dollars and Fifty-Three Cents, ($1,527.53) collected upon the One Hundred and Thirty-Five Thousand Seven Hundred and Eighty Dollars, ($135,780.) advanced to the aforesaid five sisters of the deceased testator prior to July 1, 1902 as set forth in Finding VII Rec. 14, and the sum of Two Thousand Two Hundred and Sixty-Three Dollars and Ninety-Five Cents ($2,263.95) collected as a tax upon the legacy of aforesaid Florence Lester as shown by (Finding VI, Rec. 13, 14), which the executor set aside in his own hands or possession prior to July 1, 1902 (Findings IX, Rec., 14, 15).

On April 5, 1916, appellant, through his attorneys, filed another application in the Treasury Department for the refund of the entire balance, Three Thousand Seven Hundred and Ninety-one Dollars and Forty-eight Cents ($3,791.48), of said tax under Sec. 3 of the Act June 27, 1902, and *under the provisions of the Act of July 27, 1912 (37 Stat. L., 240)*, said application was rejected by the Secretary of the Treasury on November 13, 1916, on the ground that said sum was legally due and collected by the United States (Finding X, Rec., 15).

The moneys for the recovery of which this suit was

instituted were paid as legacy taxes under Sections 29 and 30, of the act commonly known as the "Spanish War Revenue Law," approved June 13, 1898 (30 Stat. L., 448), as amended by the Act of Congress approved March 2, 1901, which took effect July 1, 1901 (31 Stat. L., 938, 946).

The portions of Sections 29 and 30 material to the case are given below, the amendments by the Act of March 2, 1901, are indicated by italics.

> "Sec. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of $10,000 in actual value, passing after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, or bargainer, to any person or persons or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows, that is to say: Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:
>
> "*FIRST.* Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property,

as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

* * * * * * * *

"*FIFTH.* Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest. * * *"

"Where the amount of value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax set forth shall be multiplied by one and one-half; and where the amount or value of such property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three." * * *

* * * * * * * *

"*PROVIDED, That nothing in this section shall be construed to apply to bequests or legacies for uses of a religious, literary, charitable or educational character, or for the encouragement of art, or to legacies or bequests to societies for the prevention of cruelty to children, including all bequests or legacies of such character on which the tax im-*

posed had not been paid or collected on the first day of March, nineteen hundred and one. And, provided further, That the provisions of this Act and of the Act hereby amended shall not be held to apply to any estate where the testator or intestate died before June thirteenth, eighteen hundred and ninety-eight.

SEC. 30. That the tax or duty aforesaid *shall be due and payable in one year after the death of the testator and* shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, *having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust and every executor, administrator, or trustee,* before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, *or in which the property was located in case of non-residents,* the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule list or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magis-

trate or officer having lawful power to administer such oaths. * * *

* * * * * * * *

Any tax paid under the provisions of Sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged."

Section 29 as amended was repealed to take effect July 1, 1902, by the Act of Congress approved April 12, 1902 (32 Stat. L., 96, 97, Chap. 500). The eighth section of which is as follows:

"That all taxes or duties imposed by section twenty-nine of the Act of June 13, 1898, and amendments thereof, prior to the taking effect of this Act, shall be subject as to lien, charge, collection, and otherwise, to the provisions of section thirty of said Act of June 13, 1898, and amendments thereof, which are hereby continued in force, as follows:

* * * * * * * *

"The material portions of the thirtieth section have been heretofore given.

On June 27, 1902, the President approved an act entitled: 'An Act to Provide for Refunding Taxes Paid Upon Legacies and Bequests for uses of a Religious, Charitable, or Educational Character for the Encouragement of Art, and so forth, under the Act of June 13, 1898, and for other purposes' 32 Stat., 406, Chap. 1160), which is as follows:

"That the Secretary of the Treasury, under appropriate rules and regulations to be prescribed by him be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the corporations, associations,

societies, or individuals as trustees or executors, such sums of money as have been paid by them as taxes upon bequests, or legacies for uses of a religious, literary, charitable, or educational character, or for the encouragement of art, or legacies or bequests to societies for the prevention of cruelty to children, under the provisions of section twenty-nine of the act entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' approved June thirteenth, eighteen hundred and ninety-eight.

SEC. 2. "That the Secretary of the Treasury, under rules and regulations to be prescribed by him, be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, sums paid for documentary stamps used on export bills of lading, such stamps representing taxes which were illegally assessed and collected.

SEC. 3. That in all cases where an executor, administrator or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury, be and he is, hereby authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1st, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under

said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two.

SEC. 4. That taxes which shall have accrued before the taking effect of the act of April twelfth, nineteen hundred and two, entitled 'An Act to repeal war revenue taxation, and for other purposes,' and since July first, nienteen hundred and two, upon securities delivered or transferred to secure the future payment of money are hereby remitted."

On July 27, 1912, the President approved another act of Congress, entitled: "An Act Extending the Time for the Repayment of Certain War Revenue Taxes Erroneously Collected" (37 Stat. L., 240), which reads as follows :

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter."

"SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated to such claimants as have presented or shall hereafter, so present their claims, and shall es-

tablish such erroneous or illegal assessment and collection, any sums paid by them on their account or in their interest to the United States under the provisions of the act aforesaid."

It is upon the third section of the Act of June 27, 1902, and by reason of the provisions of the Act of July 27, 1912, hereinbefore set out, that this suit is predicated.

On November 20, 1916, appellant filed his original petition in the Court of Claims (Rec., 1). On June 3, 1918, the case was argued and submitted (Rec., 12), and on June 17, 1918, the United States Court of Claims entered Findings of Fact and Conclusion of Law, the latter being as follows:

"Upon the foregoing Findings of Fact, the Court decides as a conclusion of law that the claim for the tax sought to be recovered in this case is barred by the Statute of Limitations and that the plaintiff's petition should be and it is hereby dismissed with judgment against the plaintiff in the sum of Fifty-one Dollars and Thirty Cents ($51.30) for the cost of printing the record, to be collected by the Clerk as provided by law" (Rec., 15).

On July 3, 1918, the appeal of the plaintiff from the judgment was allowed by the United States Court of Claims (Rec., 16).

ARGUMENT.

POINT I.

THE CASE IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

POINT II.

THE MONEYS PAID BY THE CLAIMANT AS TAXES ON THE LEGACIES BEQUEATHED BY THE LAST WILL AND TESTAMENT OF ARTHUR T. HENDRICKS, THE DECEASED TESTATOR, ARE CLEARLY REFUNDABLE UNDER THE TERMS OF AND DIRECTIONS CONTAINED IN THE REFUNDING ACTS OF JUNE 27, 1902 (32 Stat. L., 406), AND JULY 27, 1912 (37 Stat. L., 240).

> *The moneys assessed and collected as a tax on all legacies bequeathed by the Last Will and Testament, which is now retained in the U. S. Treasury, was assessed and collected on contingent beneficial interests which had not vested in absolute possession or enjoyment prior to July 1, 1902.* * * *

POINT I.

THE CASE IS NOT BARRED BY THE STATUTE OF LIMITATIONS. * * *

In the case at bar, the taxes were paid on December 6, 1902 (Rec., 14). Claims for the refund of four thousand two hundred and fifty-five dollars and forty-five cents ($4,255.45), the entire amount of tax col-

lected, were filed in the Treasury Department under the refunding acts of June 27, 1902, *on October 5, 1904,* and *March 4, 1915* (Rec., pp. 14, 15), *and under the refunding acts of June 27, 1902, and July 27, 1912, on April 5, 1916* (Rec., 15), which were disposed of by the Treasury Department March 7, 1912, November 10, 1915, and November 13, 1916, respectively (Rec., pp. 14, 15). Suit was brought in the Court of Claims November 20, 1916 (Rec., 1).

Very little discussion need be indulged in in order to show this Court that the decision of the lower court, dismissing the petition in the case at bar on the ground that the claim is barred by the Statute of Limitations is erroneous and directly in conflict with the very recent decision of this Court in the case of Williams H. Sage, *et al.,* Executors, vs. the United States, No. 344, October Term, 1918, decided on May 19, 1919 (248 U. S., p. 33), (which was rendered subsequent to the decision of the lower court in the case at bar), because in the case at bar, *the first claim was presented for the refund of the entire amount of the tax on October 5, 1904,* and the claimant had, by reason of the refunding act of July 27, 1912, six (6) years from January 1, 1914, in which to bring his suit in the Court of Claims, and therefore, it is directly within and entitled to the benefits of the provision of the refunding act of July 27, 1912, aforesaid. This Court in the recent Sage case said, speaking of the Act of July 27, 1912:

> * * * "Suppose that no suit had been brought, we can see no ground for denying that the claim would have been presented within the meaning of

the act. It did not have to be a claim under the act, as the statute in terms contemplated that it might have been presented before the statute was passed. But if the presenting was sufficient before the suit was brought, it is sufficient now. The statute, of course, does not confine its act of justice to unrejected claims.

The Act of 1912 applied in terms to 'all claims for the refunding of any internal tax alleged to have been erroneously and illegally assessed and collected' under the above mentioned Sec. 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no Statute of Limitations could begin to run. After the act was passed an application was made on September 7, 1916, to the Secretary of the Treasury for repayment of the residue of the erroneously collected tax. It was rejected on October 30, 1916, on the mistaken ground that the judgment against the Collector finished the matter. This suit was brought January 23, 1917, and so was within the six (6) years allowed by Revised Statute 1069 for suits in the Court of Claims. The Act of 1912, like that of 1902, created rights where they had not existed before, United States vs. Hvoslef, 237 U. S., 1, 12, 13, and the claimant's rights are not barred. See further, James vs. Hicks, 110 U. S. 272." * * *

POINT II.

THE MONEYS PAID BY THE CLAIMANT AS TAXES ON THE LEGACIES BEQUEATHED BY THE LAST WILL AND TESTAMENT OF ARTHUR T. HENDRICKS, THE DECEASED TESTATOR, ARE CLEARLY REFUNDABLE UNDER THE TERMS OF AND DIRECTIONS CONTAINED IN THE REFUNDING ACTS OF JUNE 27, 1902 (32 Stat. L., 406), AND JULY 27, 1912 (37 Stat. L. 240).

> *The moneys assessed and collected as a tax on all legacies bequeathed by the Last Will and Testament, which is now retained in the U. S. Treasury, was assessed and collected on contingent beneficial interest which had not vested in absolute possession or enjoyment prior to July 1, 1902.* * * *

The facts in this case show that the executor, prior to July 1, 1902, set up or established the trust providing for the life interest of Florence Lester by Paragraph Two of the Will, upon which a tax of Twenty-two Hundred and Sixty-three Dollars and Ninety-five Cents ($2,263.95) was collected and is now retained by the United States and the facts further show that no part of the income from said trust fund was received by the said Florence Lester prior to July 1, 1902 (Rec., 14).

The mere fact that the executor set aside or reserved sufficient personal property in his hands prior to July 1, 1902, for the purpose of caring for or establishing a trust fund from which Florence Lester was to receive

the income during her natural life, is no criterion of the vesting of this legacy in the said Florence Lester in absolute possession or enjoyment prior to July 1, 1902. To the contrary, we contend, that it made absolutely no difference whatsoever as to whether the executor held this personal property as such executor or as a trustee, because in either event, he had the possession of the same and it was subject to the debts due from the estate and also subject to the expenses incident to the administration of the estate, under the laws of the State of New York, and especially is this true when the facts in this record show that the Will was admitted to probate and record and letters testamentary were thereupon granted by the Surrogate's Court for the County of New York, State of New York, on the 17th day of March, 1902 (Rec., 12) and the legal time for distribution had not arrived on July 1, 1902, as provided for by Section 1819 and 2721 of the Code of Civil Procedure of the State of New York which gives at least one year from the date of issuance of the letters testamentary or of administration before the accounting and distribution can be made, no provision having been contained in the Will of Arthur T. Hendricks, the decedent (Rec., 13), upon which an earlier distribution could be made under Section 2723 of the Code of Civil Procedure of the State of New York.

The tax of Twenty-two Hundred and Sixty-three Dollars and Ninety-five Cents ($2,263.95) assessed and collected on the legacy of Florence Lester is not the only tax assessed and collected on a contingent beneficial interest which did not vest in absolute possession or enjoyment prior to July 1, 1902, but, in addition thereto,

the United States assessed and collected a tax of Fifteen Hundred and Twenty-seven Dollars and Fifty-three Cents on partial legacies of the five sisters of Arthur T. Hendricks, the deceased testator, *i. e.,* Eleanor Hendricks, Justina L. Henry, Rosalie H. Allen, Miriam H. Nathan and Irene Henriques, all of which were contingent beneficial interests which could not nor did not vest in absolute possession or enjoyment prior to July 1, 1902, making a total tax of Thirty-seven Hundred and Ninety-one Dollars and Forty-eight Cents ($3,-791.48) collected upon these contingent interests, all of which is refundable to appellant under Section 3 of the Act of June 27, 1902, and under the provisions of the Act of July 27, 1912.

It was held by this Court in the case of the United States vs. Uterhart, 240 U. S., 598, that so far as the laws of the State of New York provides for the administration of estates and the decisions of the courts of the State of New York construing such laws that the same was binding upon the Federal Court and in that decision the following cases were approved:

Orr vs. Gilman, 183 U. S., 278-290.
Chandler vs. Kelsey, 205 U. S., 466, 477;
Ingersoll vs. Coram, 211 U. S., 335.

Therefore, we are to be guided in this case entirely by the laws of the State of New York as they relate to the administration of estates, which are Sections 1819, 2718, 2721, 2722 and 2723 of the Code of Civil Procedure of the State of New York in force at the time of the deceased testator, the said Arthur T. Hendricks, and continuously thereafter until July 1, 1902, and for some

time after that date (see Appendix, p. 35), and as the records in this case show that Arthur T. Hendricks, the deceased testator, died March 5, 1902, and his Will was admitted to probate and record in the Surrogates Court in the County of New York, State of New York, on March 17, 1902, and thereupon letters testamentary issued (Rec., 12), and further, that notice to persons having claims against this estate was published beginning on the 20th of March, 1902, for six months, as provided by Section 2718 of the Code of Civil Procedure of the State of New York, and that such notice did not expire until September 20, 1902 (Rec., 13), and that the Decree of Judicial Settlement was not issued by the said Surrogates Court in the due course of the law of the State of New York until April 14, 1903 (Rec., 9). No interest bequeathed by this Will could be construed as having vested in absolute possession or enjoyment prior to July 1, 1902, but, to the contrary, they were all contingent and on that date refundable.

As heretofore stated, the said Will contained no provision which required the payment of any legacy thereunder prior to the expiration of the legal period of the administration of the estate (Rec., 13) and the fact that certain advances were made to the legatees by the executor prior to July 1, 1902 (Rec., 14), whether unauthorized or not by the laws of the State of New York, were not payments of such a character as to make them contingent beneficial interests, which vested absolutely in possession or enjoyment prior to July 1, 1902. We are supported in this contention by the following authorities of the New York courts:

Robinson, *et al.*, vs. Adams (63 N. Y. Suppl., 817), in which it was held:

> * * * "There would seem to be no doubt of the correctness of the proposition that the title to the personal property of a testator vests upon his death in his executors, and that a legatee has no complete title, even to a specific legacy, until the administration, either generally or as to the particular legacy has been closed. 13 Amer. & Eng. Law, 151, 152; 2 Williams Exrs. (7 Ed.), 677-680; Hayes vs. Hayes, 45 N. J. Eq., 461, 17 Atl., 634; Goodwin vs. Jones, 3 Amer. Dec., 173; Leamon vs. McCubbin, 82 Ill., 263." * * *

In re, Te Culver's Estate (22 Misc. Rep., 217 (N.Y.); 49 N. Y. Suppl., 823):

> * * * "Stripped of all its verbiage, the sole question to be determined in this proceeding is, did the payment of this money to Surrogate Sherman relieve the administrators from all further liability and responsibility concerning it? Or must they make it good to the next of kin? Upon their appointment, these administrators became vested with the legal title to the personal property of the decedent, as trustees, for the benefit, first, of the creditors; and, second, of the next of kin. Redf. Sur. Prac., 417; Blood vs. Kane, 130 N. Y., 514; 29 N. E., 994. The duty of the administrators is to discover and collect the effects of the decedent, pay the funeral expenses and debts in their legal order and then distribute the balance, if any, in accordance with the statute of distribution, among those entitled thereto. All this, however, is to be done under the supervision and direction of the Surro-

gate's Court, for upon this Court is conferred jurisdiction to direct and control the conduct and settle the accounts of administrators and enforce the payment of debts, and the distribution of the estate of the deceased persons. Code Civ. Proc., Chap. 2472. The statute provides that upon judicial settlement of the account of administrators, if any part of the estate remains and is ready for distribution, the decree of the Court must direct distribution thereof, among persons entitled thereto, according to their respective rights. Code Civ. Proc., Chap. 2743." * * *

A leading case on this subject is the matter of Underhill (117 N. Y., 471):

* * * "The debt or claim which is spoken of in the above section as undisputed, or if disputed, established, is one due from the estate and not from a third person to the executor, *and the decree determines to whom the debt is payable, the amount thereof, and all other questions concerning the same. The decree also determines as to the validity of a distributive share of the estate.* The amount of the distributive share due any particular person must be determined by the decree, and therefore, it is open to investigate not alone the original amount of such share, but also what payments have been made upon such original amount in order that a final decree may be made for distribution and the amount thereof to each person entitled to any share. An overpayment made by the executor to any person entitled to a distributive share does not in any way diminish the amount of the estate *which the law says is in the executor's hands for distribution* (italics ours). The law does not recognize any

such overpayment, and does not therefore permit the executor to credit himself with the amount of the excess. *In legal contemplation the same is in the hands of the executor as assets of the estate which he must pay over to parties entitled thereto* (italics ours).

"An affirmative judgment in favor of the executor against the person to whom he made the overpayment, to recover such excess, is a totally distinct matter, and is not embraced in the subject-matter of the accounting.

"The decree is one in which the directions are for the executor. It directs him to pay and distribute the amount of the estate found in his hands to the persons entitled according to their respective rights, and the surrogate can enforce obedience to such decree against the executor." * * *

* * * "The surrogate has jurisdiction to determine the amounts of these payments to the legatee, which the executor shall have credit for, because upon the determination of that fact may depend the question of the amount of assets with which the executor is to be charged for the purpose of decreeing distribution thereof."

Approved in re:

Robertson's Estate, 64 N. Y. Suppl., 387.
In re Hodgmen's Estate, 140 N. Y., 430.
Lang vs. Stringer's Estate, 144 N. Y., 275.

We contend that as the debts due from the estate could not be and were not ascertained and the expenses incident to the administration thereof could not be and were not ascertained on July 1, 1902, and as the legal time for the distribution of the estate had not arrived on July 1, 1902, that the taxes collected from this estate

on December 2, 1902, were illegal, having been collected subsequent to the enactment of Section 3 of the refunding act of June 27, 1902, *supra* (Rec., 2), entirely on contingent beneficial interests, the right to which could not vest in absolute possession or enjoyment prior to July 1, 1902, and is therefore refundable to appellant under the Act of July 27, 1912, in accordance with the decisions of this Court in the following cases:

Vanderbilt vs. Eidman, 196 U. S., 480.

The case was on a certificate from the United States Circuit Court of Appeals for the Second Circuit, which presented four questions of which but one, the third, was answered. The third question is as follows:

> "Did Sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the Will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

The question was answered in the negative. In reference to the issue involved the present Chief Justice, in speaking for the Court said:

> "While the questions, apparently, present distinct matters, yet underlying and involved in them all is the fundamental consideration whether the burden imposed by the war revenue act was confined to the interest of which Alfred G. Vanderbilt had the

beneficial right of immediate enjoyment, or whether that burden also bore upon the right to the residue which Alfred G. Vanderbilt might possess or enjoy in the future, if he lived to the ages specified in the will, upon the theory that the right to so possess or enjoy in the future was technically vested." 196 U. S., 489.

The gist of the opinion may be said to be contained in the following (italics added):

"It will be observed that the duties imposed in Section 29 have relation to two classes, first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainer, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second class, the statute specifically makes the liability for taxation depend, *not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof.* By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules. A consideration of the subsequent provisions of the section laves no room for such a contention." *Ibid.*, 491-4.

Again:

> "In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached." *Ibid.*, 495.

That the Court did not restrict the requirement of actual possession or enjoyment to testate cases is shown by the following (italics added):

> "The amendments, therefore, did not, in our opinion, justify the construction that Congress intended by adopting them to cause death duties to become due within one year as to legacies and *distributive shares* which were not capable of being immediately possessed or enjoyed, and were therefore not subject to taxation under the original act." *Ibid.*, 498.

Again:

> "Concluding, as we do, that there was no authority under the Act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned upon his attaining the ages of thirty and thirty-five years, respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government." *Ibid.*, 501.

The decision of this Court in the Vanderbilt case must be considered in the light of its decisions in the Jones and Pratt cases (236 U. S., 106, 113, 562, 567).

Actual possession without legal right or possession with a defeasible right, in the event the debts ascertained subsequent to July 1, 1902, and before the legal period of administration expired, exceeded the assets of the estate, *does not meet the requirements of the statute of absolute possession or enjoyment.*

In United States vs. Jones, 236 U. S., 108, it was held that a distributive share arising out of the estate of an intestate was a "contingent beneficial interest" within the meaning of that act. Of Section 3 of the Act of June 27, 1902, the Court then said:

> "We think its meaning and purpose are plain. Briefly stated, it deals with legacies and distributive shares upon the same plane, *treats both as 'contingent' interests until they 'become absolutely vested in possession or enjoyment,'* directs that the tax collected upon contingent interests not so vested prior to July 1, 1902, shall be refunded and forbids any further enforcement of the tax as respects interests remaining contingent up to that date." 236 U. S., 106, 113.

The final sentence of the foregoing is repeated in McCoach vs. Pratt, 236 U. S., 562, 567, being preceded by this:

> *"What is meant by 'contingent' is indicated by the phrase with which it is contrasted and by its application to distributive shares* as well as to legacies. The only sense in which the former are con-

> tingent—and it is practical rather than technical—is that they come into being only where, in due course of administration, *the debts of the deceased are ascertained,* and it is found that a surplus remains for distribution. It is in this sense that the word is applied to distributive shares, and, *of course, it is applied to legacies in the same way."*

Thus it has been conclusively determined that, within the intendments of the Act of June 27, 1902, every interest of every distributee or legatee is *"contingent" until it has "become absolutely vested in possession or enjoyment"* and that both distributive shares and legacies *remain contingent* and do not vest absolutely in possession or enjoyment until—

> "in due course of administration, the debts of the deceased are ascertained." * * * McCoach vs. Pratt, 236 U. S., 562, 567.

The words "absolutely vested in possession or enjoyment" in the Refunding Act of June 27, 1902, must be given their legal and proper meaning. These words in the Refunding Act can not be disregarding or ignored.

"Absolute" is defined in Rapalje & Lawrence's Law Dictionary as "complete; final; perfect; unconditional; unrestricted; an estate without condition or qualification."

As said Chief Justice Marshall in Johnson's and Graham's Lessee vs. McIntosh (8 Wheaton, 543; 5 L. Ed., 681):

> "An Absolute must be an exclusive title, or at least a title which excludes all others not compatible with it."

It follows that the decisions in the United States vs. Jones, *supra*, and McCoach vs. Pratt, *supra*, produce this result, namely—

Until the administrator or executor is ready to pay an ascertained distributive share or legacy, in full and without diminution, to the distributee or legatee there can not be a taxable right, in view of the Act of June 27, 1902.

The judgment in the United States vs. Jones, *supra*, was rendered not only upon the ground that—

> "debts and expenses had not been ascertained,"

but also, upon the grounds that—

> "what, if anything, would remain after their payment was uncertain,"

and—

> "the time had not come when the daughters were entitled to a distribution."

In the *Jones case* the court said:

> "We see no escape from the conclusion that the tax in question must be refunded. It was collected upon ditributive shares which neither were nor could have been absolutely vested in possession or

enjoyment prior to July 1, 1902. The intestate's death had occurred only three days before, no administrator had been appointed, *the debts and expenses had not been ascertained, what, if anything, would remain after their payment was uncertain, and the time had not come when the daughters were entitled to distribution.*" United States vs. Jones, 236 U. S. 106, 114.

All of the conditions enumerated in the foregoing are applicable to the case at bar. In the instant case the decedent died on March 5, 1902, and letters testamentary were issued on his estate on March 17, 1902. The notice of publication as required by the laws of the State of New York was advertised under decree of the Surrogate's Court once a week for six months, and such notice did not expire until September 20, 1902. Therefore, the debts and expenses of this estate could not have been ascertained on July 1, 1902. The amounts which would pass to the legatees could not and were not ascertained on that date; none of the legatees had on July 1, 1902, become entitled to the payment of their legacies nor could any legal or valid payment be made to them under the laws of the State of New York until one year after the issuance of the letters testamentary on March 17, 1902, aforesaid.

We contend that the cases of the United States vs. Jones, and McCoach vs. Pratt, supra, clearly decide that no advancement or distribution such as might be contended by the defendant in this case as having been made before July 1, 1902, was the passing of personal property in absolute possession or enjoyment before July 1, 1902, within the intendment of Section 3 of

the Act of June 27, 1902, supra. To the contrary, these decisions clearly show that where the time allowed by the law of the State for the presentation of claims of creditors against the estate had not expired, and the expenses incident to the administration of the estate had not been fully ascertained, and the period of administration of the estate allowed by the law of the State before a distribution could be made, had not arrived, that any legacy tax collected by the United States under the War Revenue Act of June 13, 1898, on such personal property was a tax assessed and collected on contingent beneficial interests, the right to which did not vest in absolute possession or enjoyment on or before July 1, 1902, and was refundable under the Act of June 27, 1902.

Extremely persuasive on this point is the fact that the tax was a progressive tax, the rate increasing with the value of the distributive share or legacy. Resort to such progressive tax plainly implies that *the tax is never to attach until the value becomes an ascertained* value, because until then the rate to be applied can not be known. Indeed the amendatory act contained new provisions not expressly found in the original act which would be impracticable of execution if the tax was to be assessed and collected before the beneficiary and the rate of tax could certainly be determined. Vanderbilt vs. Eidman, 196 U. S., 480, 498 and 499. This consideration was found to be of importance in the United States vs. Jones, *supra*, the Court with reference to the legatees and distributees saying:

"The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. *But that that right was not intended to be taxed before there was an ascertained surplus or residue* to which it could attach is inferable from the taxing act as a whole and especially from the provisions whereby the rate of the tax was made to depend upon the value of the legacy or distributive share." 236 U. S., 106, 112.

The foregoing immediately precedes the following:—

"True, by that act, the executor or administrator was required, before surrendering a legacy or distributive share to whoever was entitled to receive it, to pay the tax assessed thereon and to deduct the amount from the particular legacy or distributive share, but this did not mean that the tax was to be assessed or paid in the absense of a right to immediate possession or enjoyment. On the contrary, as was held in Vanderbilt vs. Eidman, 106 U. S., 480, on page 406, it imported the existence of a 'practically contemporaneous right to receive the legacy or distributive share.'" 236 U. S., 106, 112.

Approved:

Uterhart, *et al.*, vs United States, 240, U. S., 598.
Coleman vs. United States, 236 U. S., 562.
Sage vs. United States, ~~248~~ 270 U. S. 33

Never, prior to July 1, 1902, could the tax have attached to the interests of the legatees here represented

if it could not attach, as declared by the foregoing until they were entitled to "immediate possession or enjoyment" of the whole of the legacies to them, or until each of them had "a practically contemporaneous right to receive" the legacy. No *right* of *piece-meal taxation* is indicated in the statute, or by any of the decisions, and it is wholly evident that *the value of the rights of these legatees was not ascertained or capable of ascertainment prior to July* 1, 1902. Their rights were, therefore, contingent and not absolutely vested in possession or enjoyment on that date, within the intendments of the Act of June 27, 1902, and accordingly judgment is prayed for in the sum of Thirty-seven Hundred and Ninety-one Dollars and Forty-eight Cents ($3,791.48).

The above cases being approved by this Court in the following decisions:

Fidelity Trust Company vs. United States, 222 U. S., 158.
U. S. vs. Uterhart, *et al.*, 240 U. S., 598.
U. S. vs. Jones, 236 U. S., 106 and
McCoach vs. Pratt, 236 U. S., 562.
Coleman vs. United States, 248 U. S.
Sage vs. United States, ~~248~~ 250, U. S. 33

The last two cases having been recently decided, October term, 1918, on May 19, 1919.

CONCLUSION.

We feel that we need not go into this question any further as we have covered the argument as to the merits of the case fully as set out under Point II of

this brief, and, the foregoing considered, we contend the appellant should be refunded the sum of Thirty-seven Hundred and Ninety-one Dollars and Forty-eight Cents ($3,791.48), which is the balance of the tax paid by appellant to the United States. We believe that we have shown clearly that this tax was paid on contingent beneficial interests which could not be and had not vested in absolute possession or enjoyment prior to July 1, 1902, and, therefore, such sum represents the retention of illegal taxes which should be refunded to appellant under Section 3 of the Act of June 27, 1902, or under the provisions of the Act of July 27, 1912.

The judgment should be reversed, all of which is respectfully submitted.

SIMON LYON.
R. B. H. LYON,
Attorneys for Appellant.

APPENDIX.

Laws of the State of New York.

Sections 1819, 2718 (so far as material in this case), 2721, 2722, and 2723 of the Code of Civil Procedure of the State of New York in force at the time of the decease of Arthur T. Hendricks and continuously thereafter until July 1, 1902, and for some years thereafter, are as follows:

Section 1819. If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue, when the executor's or administrator's account is judicially settled, and not before.

Section 2718. The executor or administrator at any time after the granting of his letters, may insert a notice, once in each week for six months, in such newspaper or newspapers printed in the county as the Surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice ,at or before a day therein named, which must be at least six months from the day of the first publication of the notice. * * * If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies or in making distribution to the next of kin before such suit was commenced .

Section 2721. No legacy shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or administration, unless directed by the will to be sooner paid. If directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void , that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto. After the expiration of one year, the executors or administrators must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportions. Such payments shall be enforced by the Surrogate in the same manner as the return of an inventory, and by a suit on the bond of such executor or administrator whenever directed by the Surrogate.

Section 2722. In either of the following cases a petition may be presented to the Surrogate's Court, praying for a decree, directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made:

"1. By a creditor, for the payment of a debt, or of its just proportional part at any time after six months have expired since letters were granted.

"2. By a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share, for the payment of satisfaction thereof, or of its just proportional part, at any time after one year has expired since letters were granted.

On presentation of such petition, the Surrogate must issue a citation accordingly; and on the return thereof, he must make such a decree in the premises as justice requires. But in either of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner.

"1. When an executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity and legality, absolutely, or on information and belief.

"2. Where it is not proved, to the satisfaction of the Surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction.

Section 2723. In a case specified in subdivision second of the last section, the Surrogate may in his discretion, entertain the petition at any time after letters are granted, although a year has not expired. In such a case, if it appears, on the return of the citation, that a decree for payment may be made, as prescribed in the last section; and that the amount of money and the value of the other property in the hands of the executor or administrator applicable to the payment of debts, legacies and expenses, exceed, by at least one-third, the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim and of all legacies and distributive

shares of the same class; and that the payment or satisfaction of the legacy, pecuniary provision or distributive share, or some part thereof, is necessary for the support or education of the petitioner; the Surrogate may, in his discretion, make a decree directing payment or satisfaction accordingly, on the filing of a bond, approved by the Surrogate, conditioned as prescribed by law, with respect to a bond which an executor ~~of~~ an administrator with the will annexed may require from a legatee, on payment or satisfaction of a legacy, before the expiration of one year from the time when letters were issued, pursuant to a direction to that effect contained in the will."

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 162.

CHARLES I. HENRY, as Sole Executor under the last Will and Testament of ARTHUR T. HENDRICKS, *Appellant.*

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS BRIEF IN REPLY.

SIMON LYON,
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Atorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS BRIEF IN REPLY.

Appellant files this brief in reply to the points made in the brief filed on behalf of the United States, January 17, 1920.

I.

Counsel for the United States admits that the Court of Claims erred in dismissing the petition on the ground that the suit was barred by the Statute of Limitations (Rec. 15), in view of the recent decision

of this Court in Save vs. United States, 250 U. S., 33, (Page 4 of brief on behalf of the United States).

II.

Merits.

It is stated in the brief filed on behalf of the United States on Page 6: "It is, of course, true that, as a general rule, a legatee cannot demand payment of a legacy until the estate has been administered. But the rule is for the protection and convenience of executors or administrators and may be waived by them."

The most important reason has been omitted in that the legatee cannot demand payment of the legacy until the estate has been duly administered as required by the Laws of the particular State because the creditors of an estate have first claim upon the assets and until the debts, charges and expenses of the estate have been satisfied in the due course of administration thereof, an executor cannot under any circumstances entertain the payment of a legacy.

Counsel for the Government in the brief at the botton of page 6 further states:

> "In this connection it is to be noted that Section 2723 of the New York Code provides that the Surrogate in his discretion may authorize the payment of a legacy at any time after the granting of letters where it appears that the estate is abundantly solvent and payment is required for the support and education of the legatee."

We do not find that this Section 2723 contains any such provision. It will be observed this Section is quoted *in full* in appellant's brief at page 38-39 and

concludes with the statement that the Surrogate may authorize a payment in his discretion for the support and education of the petitioner and may in his discretion make a decree making payment or satisfaction accordingly *in the filing of a bond approved by the Surrogate* conditioned as prescribed by law with respect to a bond which an executor or an administrator with the will annexed may require from a legatee on payment or satisfaction of the legacy before the expiraion of one year from the time when letters were issued *pursuant to direction to that effect contained in the will.*

It will be observed from the Will in this case (Rec. 12) that there was no legacy for the support and education of any of the legatees, in fact all were adults, married sisters of the decedent, and the trust beneficiary was a stranger in blood who was forty (40) years of age at date of decedent's death (Rec. 13) and further his will contained no provision requiring the payment of any legacy thereunder prior to the expiration of the legal period for the administration of the estate (Rec. 13).

Counsel for the United States on page 7 of the brief states that in the present case the estate was abundantly solvent and makes reference to this fact on page 8 of his brief that the best evidence of complete solvency prior to July 1, 1902, is the fact that the executor was willing to make these payments and also establish the trust, and further states that because the executor was willing to make advance payments and establish the trust prior to July 1, 1902, that this represented the judgment of a prudent man in full possession of the facts.

It could not possibly be determined whether or not

he was prudent until the year of administration had expired, in fact in this case the decedent did not die until March 5, 1902, and letters testamentary were issued March 17, 1902, and the notice to creditors required by Section 2718 of the Code of Civil Procedure of the State of New York did not expire until September 20, 1902. The return of the executor showing the assets of the estate upon which the tax was assessed and paid, was not made until December 2, 1902.

It seems to us the prudence of an executor or the solvency of the estate, certainly could not have been fully ascertained at the earliest possible time until after September 17, 1902, when the required notice to creditors expired.

For counsel for the United States to say that the estate was abundantly solvent prior to July 1, 1902, is merely problematical for the solvency could not finally be determined until March 17, 1903, as creditors had at least until that time in which to present claims against the estate, the decree of judicial settlement and distribution having been made by the Surrogate's Court, New York County, New York, April 14, 1903 (Rec. 9-10).

It is common knowledge that many persons die leaving apparently a very large estate, but when in due course of administration the debts and other charges against the estate are ascertained, the net estate is insufficient to pay creditors and frequently residuary estates and specific legacies are wiped out.

The Government relies upon the following cases:

Vanderbilt vs. Eidman, 196 U. S., 480.
Uterhart vs. United States, 240 U. S., 598.
United States vs. Fidelity Trust Company, 222 U. S., 150.
Carlton et al. vs. United States, 51 Court of Claims 60.
Deford vs. United States, 52 Court of Claims, 220.

(a) Vanderbilt vs. Eidman, 196 U. S., 480.

This case is cited in appellants' brief and discussed fully therein, pp. 25, 26, 27, 32, and we fail to see wherein it supports any contention made by Counsel for the United States.

(b) Uterhart vs. United States, 240 U. S., 598.

The facts in the present case are entirely different from those in the Uterhart case and there is no analogy between the two cases. In the Uterhart case the record shows that the testator died *April 6, 1900,* and the period of administration had expired prior to July 1, 1902.

The sole question in the Uterhart case was whether or not this Court was bound to follow the decisions of the Courts of the State of New York which decreed that certain provisions of the will created a discretionary trust or powers and if so, whether or not this created certain contingent beneficial interests, and did not involve the facts which were involved in the Jones and Pratt cases, nor in the present case.

(c) United States vs. Fidelity Trust Co., 222 U. S., 148.

In this case the testator died *March 16, 1899,* and and letters testamentary were issued March 29, 1899,

and the period of administration had expired long prior to July 1, 1902.

It involved the taxability of life interests the income from which actually and legally began to be received by the cestique trust prior to July 1, 1902. The Fidelity Trust Company of Philadelphia was the trustee and one Elizabeth C. Tildon the cestique trust.

This Court held that the life interest could not be split up and as she had actually entered into the possession or enjoyment of it, the legacy had vested in absolute possession or enjoyment prior to July 1, 1902.

These facts have no application whatever to the present case.

(d) Carlton et al. vs. United States, 51 Court of Claims, 60.

The facts in this case are entirely different from the instant case. It happens that we are very familiar with the Carlton case as we were the counsel of record in the Court of Claims. It merely involved the refund of a small tax imposed on a legacy given to one Minnie A. Townsend and she was directed to pay to one Augusta H. Worthen as long as she lived, the income therefrom and after the death of said Worthen, the corpus was to be retained by said Minnie A. Townsend. We contended that the claimant was entitled to a refund of the tax because Augusta H. Worthen only took a life interest therein, the value of which could not exceed ten thousand dollars. The Court of Claims held otherwise and we had to submit, as the amount involved was not sufficient to enable us to obtain a review of the case by this Court.

The facts, however, were entirely different from those in the instant case.

(e) Deford vs. United States, 52 Court of Claims, 220.

This was an action brought to recover legacy taxes paid on the legacies of two minor children of testator who died in March, 1901, where the will was admitted to probate and record in March 1901, and the legacies actually turned over to the guardians of said minors prior to July 1, 1902.

It was contended by the claimant that the will creating these legacies or trust funds would only authorize the guardians to use the income and that payment of the principal or corpus of the same could only be made to them at the arrival of the age of twenty-one (21) years respectively, which was after July 1, 1902, and that therefore the legacies were contingent and did not vest in absolute possession or enjoyment prior to July 1, 1902.

The Court of Claims held the legacies had vested in absolute possession or enjoyment prior to July 1, 1902.

Owing to the amount involved, claimant had no right of appeal to this Court.

It will be clearly seen that in analyzing the foregoing citations that the facts in each case were entirely different and did not involve the points of law presented by appellant in his brief, and which are at issue in the present case.

Respectfully submitted,

SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

CHARLES I. HENRY, AS SOLE EXECUTOR under the last will and testament of Arthur T. Hendricks, deceased, appellant,

v.

THE UNITED STATES.

No. 162

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On November 20, 1916, appellant, as sole executor under the last will and testament of Arthur T. Hendricks, deceased, filed in the Court of Claims his petition seeking to recover from the United States the sum of $3,791.48 (being the unrecovered balance of a total sum of $4,255.45), paid, on December 6, 1902, as a tax on the interest of the legatees of the deceased in his personal estate. (Rec. 1–11.)

The general traverse was entered thereto. (Rec. 11.)

The findings of fact (Rec. 12–15) show that Arthur T. Hendricks died in New York, N. Y., on March 5,

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1902, leaving a valid last will and testament; that said last will and testament was duly admitted to probate and record by the Surrogate's Court in New York City, and that letters testamentary were issued to appellant, who was named as executor therein. (Rec. 12.)

The will contained the following bequests which are material to the case: (1) To Charles I. Henry, the sum of $50,000, in trust, to collect the income and pay it over to Florence Lester, a stranger, during her life, the principal then to become a part of testator's residuary estate; (2) to the five sisters of the testator, all the rest and residue of the estate, including said $50,000 upon the termination of Florence Lester's trust estate. (Rec. 12–13.)

While on July 1, 1902, the six months allowed by law for the presentation of claims against the estate had not elapsed, nevertheless said appellant, as such executor, prior to that date, had paid to the five sisters, as beneficiaries under the will, in equal shares, the sum of $135,780, and said executor had set up and established the trust fund bequeathed for the benefit of Florence Lester. (Rec. 14.)

On December 6, 1902, the United States collector of internal revenue for the third district of New York collected from appellant, as the tax due on the interest of said legatees, the sum of $4,255.45. It was demanded under section 29 of the act of Congress approved June 13, 1898 (ch. 448, 30 Stat. 448), entitled "An act to provide ways and means to meet war expenditures and for other purposes." The tax

was paid without protest and was covered into the Treasury of the United States in the ordinary course of business. (Rec. 13–14.)

On October 5, 1904, appellant filed an application in the Treasury Department for refund of said tax of $4,255.45, under the provisions of section 3 of the act of June 27, 1902 (ch. 1160, 32 Stat. 406); and on March 7, 1912, said application was allowed in the sum of $214.36, the same being the tax on the reversionary interest of the five sisters in the trust fund in favor of Florence Lester, the respective values of the life interest and reversion having been computed in accordance with the regulations of the Treasury Department. (Rec. 14.)

On March 4, 1915, appellant filed an application asking for refund, under said act of June 27, 1902, of the remainder of said tax, amounting to $4,041.09; and on November 10, 1915, an additional allowance was made of $249.61, the same being the amount of the tax collected on portions of the direct legacies of the five sisters which had not been received by them prior to July 1, 1902. (Rec. 14–15.)

Finally, on April 5, 1916, appellant, by his attorneys, filed an application for a refund of the remaining $3,791.48 of said tax, on the ground that it had been "collected and retained on contingent beneficial interests which did not vest in absolute possession or enjoyment prior to July 1, 1902." This application was rejected on November 13, 1916, whereupon this suit was brought. (Rec. 15.)

The Court of Claims dismissed the petition on the ground that the claim was barred by the statutes of limitation. (Rec. 15.) While the judgment can not be sustained on that ground, in view of the decision of this court in *Sage* v. *United States*, 250 U. S. 33, it is insisted that the undisputed facts, shown by the findings, require an affirmance on the merits. The question thus presented is, whether the funds received by the five sisters of the testator, paid to them by the executor as beneficiaries under the will, and the trust estate set up in favor of Florence Lester, on which the taxes in question were assessed and collected, were, prior to July 1, 1902, "contingent beneficial interests," or beneficial interests "absolutely vested in possession or enjoyment," within the meaning of the aforesaid act of June 27, 1902.

ARGUMENT.

I.

As to the funds paid to the five sisters of the testator prior to July 1, 1902.

Section 3 of the act of June 27, 1902, provides, in substance, (*a*) for the refund, upon proper application, of all taxes theretofore or thereafter collected under the act of June 13, 1898, upon contingent beneficial interests which should not become vested prior to July 1, 1902; and (*b*) that no tax should thereafter be collected under said act upon any contingent beneficial interest which should not become absolutely vested in possession or enjoyment prior to that date. (Rec. 1–2.)

In *Vanderbilt* v. *Eidman*, 196 U. S. 480, this court placed an interpretation on section 3, which has been followed in all subsequent cases. After harmonizing the two provisions of the section by holding that the taxes which the section directs to be refunded and those, the collection of which it forbids in the future, are one and the same, the court proceeds as follows:

> From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named within the intendment of the subsequent sentence. (P. 50.) [Italics in opinion.]

From the findings of the Court of Claims it appears that the payments to the five sisters of the testator, upon which the taxes here in question were imposed, were made prior to July 1, 1902. The payments, moreover, were made unconditionally to them as legatees under the will. Hence the beneficiaries were paid the money outright; it was theirs to do with as they pleased. It is submitted that these funds could scarcely have been more completely vested in possession *and* enjoyment.

Appellant argues that the case is governed by *United States* v. *Jones*, 236 U. S. 106, and *McCoach* v. *Pratt*, *id.*, 562. These cases hold that personal property does not pass directly from a decedent to legatees and distributees, but goes primarily to the

executor or administrator; and that, until, in the course of administration, it has been ascertained that a surplus of assets over debts remains, the interest of a legatee or distributee can not be said to be vested in possession or enjoyment within the act of 1902.

But in those cases the several properties, on July 1, 1902, were still in the hands of the executors and administrators, and had not been reduced with their assent and by their act to the possession and enjoyment of the legatees and distributees, as in the case at bar. It is, of course, true that, as a general rule, a legatee can not demand payment of a legacy until the estate has been administered. But this rule is for the protection and convenience of executors and administrators, and may be waived by them. As said by Prof. Schouler in his work on Wills and Administration:

> Executors may of choice, and in fact often do, pay legacies much earlier where the estate is undoubtedly ample, or a refunding bond is given. (P. 532.)

In this connection it is to be noted that section 2723 of the New York Code (appellant's brief, pp. 38–39) provides that the surrogate, in his discretion, may authorize the payment of a legacy at any time after the granting of letters, where it appears that the estate is abundantly solvent, and payment is required for the support or education of the legatee.

Moreover, it is well recognized in New York that an executor may, at his own risk, make payments on

account of legacies prior to the time fixed by law, and that where such payments are properly made the executor may receive credit therefor in his account. *Hyland* v. *Baxter*, 98 N. Y. 610; *Thorn* v. *Garner*, 113 N. Y. 198; *In re Butler's Estate*, 9 N. Y. Supp. 641.

Indeed, this is clearly implied in the language from the opinion in *Matter of Underhill*, 117 N. Y. 471, quoted in appellant's brief pp. 23–24, viz:

> The decree [upon an accounting] also determines as to the validity of a distributive share of the estate. The amount of the distributive share due any particular person must be determined by this decree, and, therefore, it is open to investigate not alone the original amount of such share, but also what payments have been made upon such original amount in order that a final decree may be made for distribution and of the amount thereof to each person entitled to any share. (117 N. Y. 475.)

In the present case the estate was abundantly solvent. The testator died possessed of personal property of the value of $229,~~970~~476.25. The valid and allowed claims against the estate amounted to $11,505.69, leaving $217,970.25 as his net personal estate. Thus after the payment to the five sisters of the $135,780 in question, and the setting up of the $50,000 trust in favor of Florence Lester, the executor still retained $~~82,190.25~~43,696.75 from which to pay the $11,505.69 of debts. (Rec. 13.)

The best evidence of the complete solvency of the estate prior to July 1, 1902, is the fact that the executor was willing to make these payments and also establish the trust. This represented the judgment of a prudent man, in full possession of the facts, that there was no possibility that the assets retained by him would not be sufficient to satisfy all claims. Being clothed with discretion, and having exercised that discretion in favor of the beneficiaries, the executor can not now be heard to say that by so doing he jeopardized not only his own interests but those of the creditors.

The case of *Uterhart* v. *United States*, 240 U. S. 598, supplies an analogy. That case involved a trust estate continuing until after July 1, 1902, under which no beneficiary was entitled to receive anything except on affirmative exercise of the discretion conferred on the trustees. As to the corpus it was held that the interest of the beneficiaries, prior to July 1, 1902, was contingent and not vested within the meaning of the act of 1902. But as to the amounts actually paid the beneficiaries by the trustees in the exercise of their discretion, it was held that their interest was vested and that the tax thereon was lawfully imposed.

II.

As to the trust fund set up in favor of Florence Lester.

The taxes here in question were assessed and collected upon the clear value of the bequest to Charles I. Henry in trust for Florence Lester, computed by

the use of mortuary tables in accordance with the regulations of the Treasury Department. (Rec. 14.)

The legacy subject to taxation was not one to Florence Lester, but one to Charles I. Henry as trustee. It was by the executor turned over to the trustee prior to July 1, 1902, and the trust was set up and established. The executor before said date had done all that could be done in the way of vesting the fund in the legatee. The estate was fully solvent and there was no contingency within the meaning of the refunding act which could defeat the beneficiary's interest.

In *United States* v. *Fidelity Trust Company*, 222 U. S. 158, the facts were similar to those in the case at bar. Referring to the facts the court said:

> The petitioner, appellee, was residuary legatee under a will in trust to hold the fund * * * and to pay over the net income to the testator's niece "in quarterly payments during all the period of her natural life." (P. 159.)

Referring to the refunding act, the court said:

> The words, "which shall not have become vested," quoted above mean the same as "absolutely vested in possession or enjoyment" in a later clause ending the tax on contingent interests unless so vested prior to July 1, 1902. On this ground it is argued at great length that only so much of the life interest of the niece as she had received before the date mentioned had vested in the sense of the clause. We are of opinion that this argu-

> ment can not be maintained. The interest of the niece was not a contingent right to income as it should accrue in her lifetime; it was a vested life estate in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity. (Pp. 159–160.)

In *Carlton et al.* v. *The United States*, 51 Ct. Cls. 60, the testator's will contained the following provision, "I also give and bequeath to said Minnie A. Townsend, her heirs and assigns forever, the further sum of $10,000, the income from which sum of $10,000 shall be by said Minnie A. Townsend paid annually or semiannually to my cousin, Mrs. Augusta H. Worthen * * * as long as said Mrs. Augusta H. Worthen shall live." The court said (pp. 64, 65):

> Without indulging in any speculation as to the trust feature of this provision of the will, its practical effect was to give to Augusta H. Worthen a life estate in $10,000, the remainder to go to Minnie A. Townsend. The possession and enjoyment of this fund so provided took effect at once upon the death of the decedent without any contingency whatever. It is true that Minnie A. Townsend did not enjoy it at once, but immediately upon passing from the possession of the executors of the will the whole corpus of the legacy was in the possession and enjoyment of the beneficiaries named in the will; and that was all the requirement of the war-revenue act to make it subject to taxation.

> It is not a question of just the kind or character of interest which the legatees took in this legacy, but did its "possession or enjoyment" go to some one without any contingency or reservation. It is its character while in the hands of the executors and at the time it is turned over by them by the terms of the will which determines whether it is taxable or not.
>
> * * * * *
>
> If the contention of the claimant is sound, then in order to make any legacy in a will taxable under the war-revenue act it would be necessary for the whole corpus of the same to rest in the possession or enjoyment of one person at once. That is not the language of the law. So far as applicable to this case it is an inheritance tax pure and simple, and in order to make a legacy taxable under it, it is only necessary that it should pass out of the hands of the executors into the possession or enjoyment of the legatee or legatees named, subject to no contingency or reservation. (See also *Deford* v. *United States*, 52 Ct. Cls. 220, 225.)

That the *cestui que trust* had received no part of the income from said trust prior to July 1, 1902, is not material. The tax authorized by section 29 of the act of June 13, 1898, is a legacy tax. The legacy on which the tax here in question was imposed was the bequest to Charles I. Henry, in trust, of an estate *per autre vie* in the sum of $50,000. This legacy became vested immediately upon the payment of the fund by the executor to the trustee-legatee.

CONCLUSION.

It appears without dispute that all taxes assessed on funds received after July 1, 1902, or on the residuary interest after the trust estate, have been refunded. It is respectfully submitted, therefore, that the funds on which the taxes here in question have been assessed and collected were vested in possession or enjoyment prior to July 1, 1902, and that the judgment of the Court of Claims should be affirmed.

JANUARY, 1920.

ALEX. C. KING,
Solicitor General.
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Attorney, Department of Justice.

○

APPENDIX

So far as the liability of the legatees for the debts of the testator is concerned, it made no difference whether the six months period in which claims against the estate might be filed had expired on July 1, 1902. Section 2718 of the New York Civil Code, providing that claims against an estate must be filed within six months is merely for the protection of the executor of administrator, and does not bar the claim. Said section concludes as follows:

> * * * If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced.

Section 1837 of the Code expressly provides for action against next of kin, legatees, etc., upon claims not presented to the executor or administrator within the six months' period:

> An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

The requisites to recover in an action against a legatee are prescribed by Section 1841 of the Code, as follows:

> If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either
>
> 1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or
> 2. That the value of assets, so delivered, has been recovered by some other creditor; or
> 3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for the deficiency.

The case of City of New York v. United States Trust Co., 79 N. Y. Supp. 1010, 78 App. Div. 366, affirmed per curiam, 178 N. Y. 551, involved a situation where, by agreement of the legatees, the legacies were placed in trust for their use for life. It was held that while a judgment creditor of the testator could not sue legatees under Section 1837 of the Code, the fund not having been received by them, yet the fund could be impressed in the hands of the trustee since such fund

> is, in equity, so far as creditors are concerned, still part of the estate of the testator; and it is readily identified, and should be followed and impressed with the lien of the respondent's judgment to the extent necessary to satisfy the same.